

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



TRANSCRIPT OF RECORD.

---

Court of Appeals, District of Columbia

JANUARY TERM, 1902

No. 1173.

135

---

JACKSON & SHARP COMPANY, A CORPORATION,  
APPELLANT,

*vs.*

JOHN C. FAY.

---

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

---

FILED JANUARY 22, 1902.



# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1902.

No. 1173.

---

JACKSON & SHARP COMPANY, A CORPORATION,  
APPELLANT,

*vs.*

JOHN C. FAY.

---

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

---

## INDEX.

	Original.	Print.
Caption .....	<i>a</i>	1
Declaration .....	1	1
Demurrer .....	5	4
Demurrer sustained; judgment; appeal, and amount of appeal bond fixed .....	7	5
Memorandum : Appeal bond filed .....	8	5
Clerk's certificate .....	9	6



**In the Court of Appeals of the District of Columbia.**

JACKSON & SHARP COMPANY, a Corporation, Appellant,  
*vs.*  
 JOHN C. FAY. } No. 1173.

*a* Supreme Court of the District of Columbia.

JACKSON & SHARP COMPANY, a Corporation,  
Plaintiff,  
vs.  
JOHN C. FAY, Defendant.

No. 43930. At Law.

UNITED STATES OF AMERICA, } ss :  
*District of Columbia,*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

**1 Declaration.**

Filed May 15, 1900.

In the Supreme Court of the District of Columbia.

JACKSON & SHARP COMPANY, a Corporation,  
Plaintiff,  
vs.  
JOHN C. FAY, Defendant.

} No. 43930. At Law.

The plaintiff sues the defendant for that heretofore, to wit, on the 14th day of August, 1895, and for some time prior thereto, one Daniel A. Driscoll was indebted to the plaintiff in the sum of \$732, to wit, for labor and materials furnished by the plaintiff to the said Driscoll to enable him to complete a contract entered into by him with the United States for the construction of the New Haven, Connecticut, post-office building, for which indebtedness the said Driscoll applied to the plaintiff to accept his order upon the defendant in the sum of \$732, directing the defendant to pay to the plaintiff the said sum out of the first moneys realized from a suit by the said Driscoll against the United States, then about to be brought in the

Court of Claims, to recover the balance of the contract price and extra work due to said Driscoll from the United States for and on account of said building, and the plaintiff, before accepting said order, conferred with the defendant, who was and for many years had been an attorney-at-law, and was then employed in that capacity to prosecute the said claim of the said Driscoll against the United States in the Court of Claims, to learn from the defendant whether the moneys which the said Driscoll might or should recover in the said action would pass through the hands of the said defendant so that the plaintiff would be safe in acceptance thereof, and it then and there became the duty of the defendant to inform the plaintiff of the fact, which was well known to him, but of which the plaintiff was wholly ignorant, that under the rules, regulations, and practice of the Treasury Department, by which department the said claim would be paid after judgment recovered, the proceeds of the said claim or judgment would not be paid to the defendant, but would be paid to the said Driscoll personally, and the defendant, disregarding his said duty in the premises, but, on the contrary, wrongfully intending to mislead the plaintiff to its injury, and to induce it to accept the said order, represented and declared to it that the moneys which would result or be realized from the said suit would certainly pass through his hands, and that he would thereby be enabled to pay to the plaintiff the amount of the said order, and that he would make payment thereof, to wit, when the said claim had been reduced to judgment and paid, and thereupon the plaintiff, in reliance upon the said statement of the said defendant, accepted from the said Driscoll an order upon the defendant substantially in the words and figures following :

In the Court of Claims.

DANIEL A. DRISCOLL }  
 vs. }  
 THE UNITED STATES. }

Action against the United States to recover balances and extra work for the construction of the United States Government building at New Haven, Conn.

John C. Fay, attorney-at-law, Washington, D. C.

3 DEAR SIR: Please pay to the Jackson & Sharpe Company, of Wilmington, Delaware, out of the first money realized from the above-described claim, after payment of expenses of litigation and counsel fees, the sum of seven hundred and thirty-two dollars.

Dated at Washington, D. C., August 14th, 1895.

(Signed)

DANIEL A. DRISCOLL.

And the said defendant thereupon accepted the said order substantially in the words and figures following:

Accepted, payable out of the first funds coming into my hands out of said claim.

August 14, 1895.

(Signed)

JOHN C. FAY.

And the plaintiff, relying upon said order and acceptance and upon the representations and assurances of the defendant that the moneys realized from the said claim or upon the judgment which should be recovered thereupon would come into his hands and would by him be applied to payment of the said order, thereupon refrained from protecting itself by legal proceedings, as it could and would otherwise have done, which representations and assurances the defendant, wrongfully intending to mislead the plaintiff to its injury, as aforesaid, continued to make, to wit, from time to time until the said claim had resulted in judgment and was actually about to be paid, to wit, until the 12th day of February, 1900, when for the first time, and when it was too late for the plaintiff to protect itself by legal proceedings against the said Driscoll, the said defendant, well knowing the same, notified the plaintiff that the avails of the judgment would be paid to the said Driscoll direct,

4 and would not come into his hands at all, and the said defendant thereupon co-operated with and aided the said Driscoll to receive the said moneys directly, without passing through the hands of him, the said defendant, and by reason of the said wrongful and untrue representations and affirmations of the defendant that the said moneys would pass through his hands, intended by him to mislead the plaintiff, as aforesaid, and made with knowledge by the defendant that, under the rules, regulations, and practice of the Treasury Department, the said moneys would not come into his hands, the plaintiff has been misled, deceived, and imposed upon, and has wholly lost the said moneys, to its damage in the sum of \$732. Wherefore it brings this suit.

DOUGLASS & DOUGLASS,  
JOSEPH D. WRIGHT,  
J. J. DARLINGTON,

*Attorneys for Plaintiff.*

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

DOUGLASS & DOUGLASS,  
JOSEPH D. WRIGHT,  
J. J. DARLINGTON,

*Attorneys for Plaintiff.*

5 *Demurrer to Declaration.*

Filed August 22, 1900.

In the Supreme Court of the District of Columbia.

JACKSON & SHARP COMPANY, a Corporation, Plaintiff, vs. JOHN C. FAY, Defendant.	}	At Law, No. 43930.
---	---	--------------------

The defendant says the declaration herein is bad in substance.

J. M. WILSON,  
A. A. HOEHLING, JR.,  
*Attorneys for Defendant.*

NOTE.—Among the matters at law intended to be argued in support of the foregoing demurrer are the following:

1. That it appears from the said declaration that the alleged misrepresentations on the part of the defendant were not in respect of existing or past facts, but were at most promissory facts as to matters yet to come into existence and over which the defendant had no control.

2. That the alleged misrepresentation in respect of the rules, regulations, and the practice of the Treasury Department was in respect of a matter of law upon which deceit cannot be predicated, and moreover the said rules, regulations, and practice of the Treasury Department do not in fact prohibit the payment of the proceeds of a claim after judgment to the attorney, but, on the contrary, expressly authorize such payment, for which reason such representation, if made, was not, in fact, untrue.

6 3. That it appears from the allegations in said declaration contained, as well the written order relied upon by the plaintiff, that at the time of the giving thereof the defendant was the attorney for the certain Daniel A. Driscoll therein named, a relation that it was possible to terminate and revoke at any time at the will of the client and over which the defendant had no control, and in respect of which there could in law be no misrepresentations as to facts or conditions yet to come into existence.

4. That the written order relied upon by plaintiff is not an absolute guarantee that the moneys should come into the hands of the said defendant and be paid to the extent of such order to the plaintiff, but, on the contrary, is a mere assent that out of the moneys coming into his hands the order would be honored; and, further, that the terms of said order contradict the other allegations of the declaration, and are in conflict therewith.

5. That before the proceeds of said claim were collected, as appears by said declaration, the defendant duly notified the plaintiff that the moneys would not come into his hands, thereby giving to

plaintiff the benefit of the information so then acquired by said defendant, and affording it opportunity to protect itself.

6. That it does not appear by the allegations of the declaration that the said plaintiff has been damaged by any act or conduct of the defendant.

7. That the said declaration fails to set forth any facts sufficient in law to constitute a cause of action against the defendant.

J. M. WILSON,  
A. A. HOEHLING, JR.,  
*Attorneys for Defendant.*

7 Supreme Court of the District of Columbia.

MONDAY, December 9th 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

\* \* \* \* \*

JACKSON & SHARP COMPANY, a Corporation,	} At Law. No. 43930.
Plaintiff,	
vs.	
JOHN C. FAY, Defendant.	

Now comes here the defendant, by his attorney, Mr. A. A. Hoehling, Jr., and the demurrer of said defendant to said plaintiff's declaration coming on to be heard, Messrs. Douglass & Wright and J. J. Darlington representing said plaintiff, it is, upon consideration thereof, ordered that said demurrer be, and it is hereby, sustained. The plaintiff thereupon, by its attorneys, in open court, elects to stand upon its declaration; whereupon the defendant, by its attorney, in open court, moves for judgment, which is granted. Therefore it is considered and adjudged that the plaintiff herein take nothing by this suit; that the defendant go thereof without day and recover against the plaintiff his costs of suit, to be taxed by the clerk, and have execution thereof. From the foregoing the plaintiff, by its attorneys, in open court, notes an appeal to the Court of Appeals of the District of Columbia and prays that bond for costs be fixed; whereupon a bond for costs, with surety to be approved by the court, is fixed in the sum of one hundred dollars (\$100.00) dollars, with leave to said plaintiff to deposit the sum of fifty (\$50.00) dollars in the registry of this court in lieu of said bond on appeal.

8 *Memorandum.*

December 20, 1901.—\$50 deposited in lieu of bond on appeal.

9 UNITED STATES OF AMERICA, } ss:  
District of Columbia,

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 8, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 43930, at law, wherein Jackson & Sharp Company, a corporation, is plaintiff and John C. Fay is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe  
Seal Supreme Court my name and affix the seal of said court, at  
of the District of the city of Washington, in said District,  
Columbia. this 22 day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1173. Jackson & Sharp Company, a corporation, appellant, vs. John C. Fay. Court of Appeals, District of Columbia. Filed Jan. 22, 1902. Robert Willett, clerk.



COURT OF APPEALS,  
DISTRICT OF COLUMBIA.  
FILED

FEB 7 1902

*Robert Willing*  
CLERK

IN THE  
  
Court of Appeals of the District of Columbia.

**JANUARY TERM, 1902.**

JACKSON & SHARP COMPANY, A Corporation,  
*Appellant,*  
*vs.*  
JOHN C. FAY, *Appellee.* } No. 1173.

**BRIEF FOR APPELLANT.**

J. J. DARLINGTON,  
E. S. DOUGLASS,  
JOSEPH D. WRIGHT,  
*Attorneys for Appellant.*

Lynch brought dues for his relatives and friends; that to become a member, the person must sign the constitution and get his certificate of stock and pass book (108); that orders for payment were issued to witnesses Goss and Mc-Innery and are filed as exhibits; that directors knew not that appellees had bond or trust until about time suit was filed (109); that he never saw J. F. Nelligan or anyone else pay money at Lynch's house; **that Mrs. Nelligan never told him anything about payment to Lynch (110);** *that he told her to get statement, pay the amount to the treasurer, who would receipt the statement, and the attorney would give her a release (111).* (Note: **This is uncontradicted.**) *That neither the directors or the treasurer ever had any notice that Lynch had received the money from Nelligan (112);* that the question of Nelligan's indebtedness came up shortly after he stopped paying dues (114); that he tried to get Lynch to go to his aunt and insist upon her making settlement (121).

### Stipulation of Counsel

shows form of roll books (125-6); payments of dues by Nelligan (127-8), and that Nelligan's name was left off the roll books after September 1, 1891. (Note: These books do not show loans made, are not ledgers, do not purport to keep full accounts with members, but merely show accounts of payments of dues, fines, etc).

### Decree

does not adjudge that the indebtedness of Nelligan was paid to the association, but that it "has been discharged" (130). This wording was intentional on part of court below, as will appear from original decree, which contained the words "been duly paid and liquidated."

IN THE  
Court of Appeals of the District of Columbia.

---

**JANUARY TERM, 1902.**

---

JACKSON & SHARP COMPANY, A Corporation, <i>Appellant,</i> <i>vs.</i> JOHN C. FAY, <i>Appellee.</i>	}	No. 1173.
---	---	-----------

---

**Statement of the Case.**

This is an appeal from an order of Mr. Justice Clabaugh sustaining a demurrer interposed by the defendant to the declaration.

The plaintiff sued the defendant in an action at law for damages growing out of the following state of facts:

One Daniel A. Driscoll was a contractor and builder, and was engaged, about the year 1895, in constructing a post office building at New Haven, Conn., for the United States. The plaintiff furnished labor and material to Driscoll to enable him to complete his contract, and, about the 14th of August, 1895, there was an unpaid balance of \$732 due by Driscoll to the plaintiff. Driscoll, being then

insolvent, gave the plaintiff an order upon the defendant, John C. Fay, who was an attorney at law practicing before the Court of Claims and who represented Driscoll as his attorney in prosecuting a suit, then about to be brought by the latter in the Court of Claims, for money alleged to be due from the United States by reason of extra work on the New Haven contract. The plaintiff then, and before taking said order, applied to the defendant to ascertain whether the money to be realized, should the claim be allowed, would pass through his hands, so that the order would afford security for plaintiff's debt, and was told by the defendant that under the rules, regulations and practice of the Treasury Department the money would pass through his hands; whereupon the plaintiff, relying upon this representation, agreed to take the order which the defendant then and there accepted, and which is set out in the declaration. The plaintiff, because of the said representations of the defendant and of his reliance upon them, took no further steps to protect itself or to collect the said sum from Driscoll, as it could and would have done but for those representations. The judgment of the Court of Claims in the said suit being in favor of Driscoll, the defendant on the 12th day of February, 1900, when it was too late for the plaintiff to protect itself, notified it that the money from the said judgment would not pass through his hands but would be paid to Driscoll direct. There had been no change, in the meantime, in the rules, regulations or practice of the Treasury Department, the alleged representations being, the declaration alleges, known to the defendant to be erroneous at the time they were made, and made by him for the purpose of misleading the plaintiff to its injury. The declaration then charges that the defendant cooperated with and aided Driscoll to collect the said money directly, without having it pass through his hands, and that by reason of the

wrongful representations and deceit of the defendant the plaintiff has been misled, deceived and imposed upon to its damage and total loss of its said debt.

The defendant filed a demurrer to the declaration, which was sustained by the court below; and it is from this judgment that the plaintiff sued out its writ of error to this court.

### **Assignments of Error.**

The court erred in holding as a matter of law :

1. That the representation of the defendant, as set out in the declaration, that the moneys would come through his hands and would be by him applied to the payment of the order accepted by him, were representations of future or promissory facts, and that no action would lie therefor.

2. That the representations in regard to the rules, regulations and practice of the Treasury Department were representations of matters of law, upon which an action of deceit can not be predicated.

3. That because the said Driscoll could have terminated the relation of attorney and client, existing between him and the defendant, there could be no liability on the part of the defendant for any misrepresentation of facts yet to come into existence, and although, as the records show, the said relation was never so terminated, but actually continued up to the very payment of the money.

4. That the notice to the plaintiff given after the claim of Driscoll against the United States had resulted in judgment, and was actually about to be paid, was sufficient to enable the plaintiff to protect itself.

5. That the declaration fails to show that the plaintiff has been damaged by the conduct of the defendant set out in the declaration.

6. That the declaration is insufficient to constitute a cause of action against the defendant.

7. That, under the facts set out in the declaration, the defendant did not owe any duty to the plaintiff, for a violation of which he can be held liable in an action for damages.

8. That, under the facts set out in the declaration, the relation of attorney and client did not exist between the plaintiff and defendant.

9. That, under the facts set out in the declaration, a relation of trust and confidence did not exist between the plaintiff and defendant, for a violation of which trust and confidence on the part of the defendant he can be held liable to the plaintiff in an action for damages.

### **Argument.**

It is claimed on behalf of the defendant that the misrepresentations set forth in the declaration amount to nothing more than an expression of an opinion or statement of a future or promissory fact, yet to come into existence for which no action can be maintained.

It is submitted, on the contrary that these misrepresentations were in reference to the existence, force and effect of the rules, regulations and practice of the Treasury Department at the time, and hence were not future or promissory in their nature.

If however, the misrepresentations in question could properly be held to be statements as to future or promissory facts, still the true rule in such cases is that, if the misrepresentation, although in regard to the future, be made with the purpose of misleading and deceiving the plaintiff, and without any intention on the part of the defendant of ever fulfilling or complying with the terms of the misrepresentation, and with knowledge upon his

part, and corresponding ignorance on that of the plaintiff, of facts which render their performance impossible or even very improbable, then he is guilty of wilfully deceiving and misleading the plaintiff and of inducing him to act to his injury, as he would not otherwise have acted, and is liable in damages for whatever loss the plaintiff sustains in consequence of them.

The declaration charges, and the demurrer admits as true, that the defendant knew, at the time of his statements to the plaintiff, that under the rules, regulations and practice of the Treasury Department the money would not be paid him, but would be paid to Driscoll personally (Rec. 2), thus bringing this case clearly within the rule above set forth, which rule is abundantly supported by the authorities. Counsel for the plaintiff are not aware of any authority to the contrary. And the rule is founded upon the plainest principles of natural justice, for, if it were otherwise, a defendant would be permitted to mislead and defraud with impunity a plaintiff who as he knew, was trusting him in regard to a matter about which he was known to possess, and about which he held himself out as possessing special and superior knowledge.

In *Russ Lumber Co. v. Muscupiable Land Co.*, 120 Cal., 521, the court said:

“A mere promise to perform an act in the future is not, in a legal sense, a representation, nor does a failure to perform such promise convert it into a false representation; but if the promise is accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and, if falsely made, are grounds of avoiding the contract, though the thing promised to be done lies wholly in the future. \* \* \*

While a mere promise is not a ‘representation,’ a prom-

ise made with the intention of not performing it constitutes a fraud for which a contract may be rescinded or avoided."

And it must, upon the same principles, constitute a fraud for which an action will lie, where necessary to reparation of the wrong.

In *Bank v. Hammond*, 25 Col., 367, it is said :

"The rule appears to be, that a fraudulent misrepresentation can not itself be the mere expression of an opinion entertained by the party making it, but where such party makes a statement which might otherwise be only an opinion, and does not state it as the mere expression of his opinion, but affirms it as a fact, material to the transaction to which it relates, so that the person to whom it is addressed may reasonably treat it as a fact, and rely and act upon it accordingly, then such statement becomes an affirmation of a fact within the meaning of the general rule, and may be a fraudulent misrepresentation. If the representations are of such a character that they will bear either the construction that they were expressions of opinion, or statements of fact, the question which they were must be decided by the jury."

"Thus, if a person were to say that a certain ship 'will arrive tomorrow,' that would amount to a statement that he knew nothing to the contrary, and hence would be a statement of fact."

Big. on Torts, (7th Ed.) Sec. 125.

In *Touchstone v. Staggs*, 39 S. W. Rep., 189 (Tex.), an equity case, the court stated the rule as follows:

"We understand the law to be that, if a false promise is made about a matter which is material, although it may relate to an obligation to be performed in the future, if at the time the promisor fraudently makes the promise with the intention and purpose of influencing the action of the

other, and it does influence his conduct in parting with his property, then equity will afford relief, if there has been any substantial injury that results from the failure to keep the promise."

"Representations as to the probable earnings of a corporation, which the party making them desires to organize, made to induce the party to whom they are made, to become a stockholder in the corporation, may be fraudulent and constitute a basis of action if made in bad faith, with a design to deceive and mislead said party, by one possessed of superior knowledge on the subject."

French v. Ryan, 104 Mich., 625.

It will not avail the appellee in the case at bar even if the misrepresentations charged can be classed as mere expressions of opinion, for he thereby stated, in effect, that he knew of no facts the existence of which would negative the opinion he assumed to express. If he did know of such facts, as the demurrer concedes, then he stated as his opinion what, in truth, was not such, and he can not escape liability by merely representing in the form of an opinion the non-existence of facts, which, plainly and within his knowledge, as the demurrer admits, do exist. If he stated to the plaintiff, or to its agent, that the money would certainly pass through his hands, when he knew of the existence of a rule of the Treasury Department, unknown, as he also knew, to the plaintiff, which rule would prevent its coming into his hands, he can not defeat the plaintiff's right of recovery by saying that his statements were only in the form of an opinion, because clearly such could not have been his opinion.

Having assumed to advise the plaintiff, it was his duty to do so fairly and fully and to disclose all the facts which would render it impossible or improbable for him to collect the money; and having omitted to do this, and

especially as the omission is for present purposes admitted to have been for the very purpose of misleading the plaintiff, he must answer for whatever damage the latter has suffered. A misrepresentation of one's opinion is a misrepresentation of a present and not a future fact.

"The result is that when a man states that his opinion, belief or intention is so and so, he has virtually and in real effect stated that he knows of nothing to make his statement of opinion, belief or intention a sham. If, then, the law requires that what is stated should be stated as a fact, the case in question fulfills the requirement; the statement is in effect—and that is the real test—a statement of fact. For example: The defendant, seller of a hotel under lease, says to the plaintiff, the buyer, that the tenant is a 'most desirable tenant.' Assuming that what is 'desirable' in such a case is matter of opinion, still the statement is in effect a statement of fact, for the seller impliedly states that he knows facts which justify his opinion."

Big. on Torts (7th Ed.), Sec. 124.

To the same effect is the case of *Birdsey v. Butterfield*, 34 Wis., 52:

"The vendor of cattle made *declarations of opinion* as to their weight, *which he knew to be false*, and the vendee was induced by those declarations to purchase the cattle at a certain price per head. He was not aware that the vendor *knew* (approximately) their true weight; and it was in his power, without any great difficulty, to have had them weighed before agreeing to purchase. In an action upon a note given for a part of the purchase price of the cattle, the jury having found the sale to have been effected by fraud and deceit, and having awarded a certain sum to defendant by way of recoupment for his damages resulting from such fraud, a judgment pursuant to the verdict is here affirmed."

A very recent and well-considered case on this subject

is that of *Hedin v. Minneapolis Institute*, 62 Minn., 146 ; 35 L. R. A., 417, in which the court say :

“When the knowingly false assertion is as to the belief of a party, or is as to his knowledge of the fact he assumes to announce, intent to deceive is the inevitable inference. If this defendant, Lawrence, having no knowledge of the truth or falsity of his statements, and not believing them to be true, made statements and representations to plaintiff that his injuries were curable, and that with treatment he could become a well and sound man, or if he made such statements, having no knowledge of their truth or falsity, yet representing that they were true, the intent to deceive is as well established as if positive knowledge of their untruthfulness had been proved. Generally speaking, the representations must be as to a material fact, susceptible of knowledge ; and if they appear to be mere matters of opinion or conjecture, they are not actionable. There are many cases, however, in which even a false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth. And a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie. \* \* \*

The doctor, especially trained in the art of healing, having superior learning and knowledge, assured plaintiff that he could be restored to health. That the plaintiff believed him is easily imagined ; for a much stronger and more learned man would have readily believed the same thing. The doctor, with his skill and ability, should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year's standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can

be effected. If he can not speak with certainty, let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement that he can cure, and does not believe the statement true, or if he has no knowledge of the truth or falsity of such a statement, but represents it as true, of his own knowledge, it is to be inferred that he intended to deceive. *The deception being designed* in either case, and injury having followed from reliance upon the statements, an action for deceit will lie."

Montgomery Southern R. Co. v. Matthews, 77 Ala., 357.

Kent County R. Co. v. Wilson, 5 Houst. (Del.), 49.  
Cooley on Torts, Secs. 484, 487.

In Thompson v. Phoenix Ins. Co., 75 Me., 55, it was held that, where a party puts a statement in the form of an opinion when he has positive knowledge that his statement is untrue, it is actionable.

## II.

The second assignment of error involves the question whether or not the plaintiff is to be presumed to have known the rules and regulations of the Treasury Department.

It is submitted that these rules and regulations are made by the Secretary of the Treasury for the purpose of governing the internal workings of that department, and under no view of law do they constitute such a class as would raise the presumption of knowledge of them upon the part of the defendant. This presumption can not arise merely from the fact that the courts take judicial cognizance of such rules and regulations. It can not be argued that, because the courts take judicial cognizance of all of the public statutes of the States, a citizen of one

State will be presumed to know the statutes of every other State.

Finch v. Mansfield, 97 Mass., 89.

In the second place, the presumption that every man knows the law has no application to the case of a layman applying to a lawyer for information as to the law, and relying upon the information given.

As to the third assignment of error, it is true that the relationship of attorney and client, existing between defendant and Driscoll, might have been terminated before the money in question was recovered from the Government. The plaintiff took, as it had a right to take, the chance that this would not occur. It never did occur—and if it had done so, and if the defendant had so informed the plaintiff, as it would have been his duty to do, the latter would not have been without remedy.

It is a novel proposition that legal liability for the loss arising from a tort may be escaped by showing that if something had happened which did not happen, the plaintiff would have lost anyway.

With regard to the fourth assignment of error, the question whether the notice ultimately given by the defendant to the plaintiff that the money would not pass through his hands was given in time to enable the plaintiff to protect itself would in a proper case under the pleadings, be a question of fact, or of mixed law and fact—not one to be passed upon by the court upon demurrer to the declaration. In the present case, however, the declaration alleges, and the demurrer admits, that the notice was not given until as the defendant well knew, it was too late for it to protect itself.

As to the fifth assignment of error, it is submitted that the plaintiff could have protected its claim by proper pro-

ceedings against Driscoll to subject his interest in the suit between him and the United States, to the payment of the plaintiff's claim. This could have been done by the appointment of a receiver to collect the proceeds arising out of the said claim against the United States.

In the case of *Price v. Forrest*, 173 U. S., 410, it is held that an order of a State court having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver to be held subject to the order of the court for the benefit of those entitled thereto, is not in violation of United States Revised Statute Section 3477, and the Government will recognize the right of such receiver to collect the funds to be disbursed under the direction of the court.

See also :

*Borcherling's Case*, 35 Court of Claims, 311.

*Sanborn v. Maxwell*, 18 App. D. C., 245, 250.

### III.

The seventh, eighth, and ninth assignments of error may be conveniently discussed together. And if there be error in the propositions of law involved in these assignments, then the determination of the issues involved in the second assignment of error is immaterial.

As a general rule, misrepresentations as to matters of law may not constitute sufficient ground for an action for damages. Where, however, the relation of trust and confidence exists, the rule is different.

"It has been repeatedly held that the general rule as to representations of law does not apply where a relation of trust and confidence exists between the parties, nor if the person making the representation knows that the other is ignorant of the law and takes advantage of his ignor-

ance to mislead him by a false statement of the law. In such cases the representation may constitute a fraud in equity, and even at law."

14 Am. and Eng. Enc. of Law, 2d Ed., 57. See also numerous authorities cited in the note to text.

In the case of *Townsend v. Cowles*, 31 Ala., 428, which was a case at law, it is said :

"Notwithstanding a misrepresentation as to a matter of law does not *per se* constitute a fraud ; yet other circumstances concurring with such misrepresentation may make it a fraud. If any peculiar relationship of trust or confidence existed between the parties, and the plaintiff has availed himself of such trust or confidence to mislead the defendant by a misrepresentation as to the legal effect of the contract, it will constitute a fraud. So, if the defendant was in fact ignorant of the law, and the other party knowing him to be so, and knowing the law, took advantage of such ignorance to mislead him by a false statement of the law, it would constitute a fraud."

In the case of *Gordon v. Butler*, 105 U. S., 558, it is said :

"For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such for example as the capacity of boilers or the strength of materials, the case may be different. So, also for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or a lawyer upon the title of property which he has examined. The opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed and injury has followed from reliance on them, an action may lie."

In the case of *Hedin v. Minneapolis Medical & Surgical Institute*, 62 Minn., 146; 35 L. R. A., 417, it is said :

“Thus the liability may arise where one who has, or assumes to have, knowledge upon a subject of which the other is ignorant, and knowingly makes false statements on which the other relies. Where parties possess special learning or knowledge on a subject with respect to which their opinions are given, such opinions are capable of approximating the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie.”

Citing :

*Gordon v. Butler*, 105 U. S., 553.

*Robbins v. Barton Bros.*, 50 Kan., 120.

*Eaton v. Winnie*, 50 Mich., 156.

*Hicks v. Stevens*, 121 Ill., 186.

*Cooley on Torts*, 483.

In *Bigelow on Torts*, 65, it is said :

“If a person having superior means of knowing the law and professing to know it, though not a lawyer and not professing to be, should knowingly give false information of it in order to influence the conduct of one ignorant of the same, there would (so far) be an actionable misrepresentation.”

If relations of confidence exist between the parties, one may trust the statements of the other.

*Smith v. Patterson*, 33 Ohio, St., 70.

*Bradner v. Strang*, 23 Hun., 445.

*McCormick v. Malin*, 5 Blackf., 509.

It is submitted that, under the facts and circumstances of the case at bar, a relation of trust and confidence did exist between the plaintiff and the defendant. This is

true even though the defendant undertook to render a professional service gratuitously.

In the case of the National Savings Bank v. Ward, 100 U. S., 195, the defendant, an attorney at law, examined the title to a certain piece of property within the District of Columbia for a third party, and the plaintiff, upon the faith of the certificate of title made by the defendant, advanced certain money upon the property. There appeared to be no contractual relations between the plaintiff and the defendant, and the majority of the court held that, under the circumstances, the defendant was not liable. At page 206, however, the court says :

“The difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the title, or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him anything for the services he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law as expounded by the decisions of the court. Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. *Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract*, but where there is neither fraud, nor collusion, nor privity of contract, the party will not be held liable unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.”

It will be observed that the Supreme Court in the above case decided that, had the transaction been tainted with fraud, the defendant would have been liable to the plaintiff for damages resulting, even though no contract had ever existed between them, nor any consideration paid by the plaintiff for the services rendered.

See also *Davis v. Morgan*, 19 Mont., 145, which holds that where a layman applies to a lawyer for advice as to a question of law, which advice is given, the relation of attorney and client is created, though no fee was charged or paid.

“One holding himself out as possessing a peculiar knowledge or skill in any profession, business or vocation is held to the same degree of care and the same degree of liability as an agent for reward *whether he, in fact receives remuneration or not.*”

1st Am. and Eng. Enc., of Law (2d Ed.), 1070.

In *Shiels v. Blackburn*, 1 H. Bl., 158, Lord Loughborough says :

“I agree with Sir Wm. Jones that, when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for gross negligence, but if a man gratuitously undertakes to do a thing to the best of his skill, *when his situation or profession is such as to imply skill*, an omission of that skill is imputable to him as gross negligence. If, in this case, a ship broker or a clerk in the custom house had undertaken to enter goods, a wrong entry would in effect be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries.”

So in *Wilson v. Brett*, 11 M. & W., 113, it is held that a person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale, having been proved to be a person skilled in the management of horses, is held liable for injuries sustained by the horse whilst ridden by him.

Likewise in *Coggs v. Bernard*, 1st Smith's Leading Cases, 9 Am. Ed., 354, it is held that, if a man undertakes

to carry goods safely and securely he is responsible for any damage which they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage.

In *Perkins v. West Coast Lumber Co.*, 129 Cal., 427, it is said :

“This action was brought to recover for services rendered as an attorney at law. Defendant filed a counterclaim and cross demand, alleging damages occurring by reason of legal advice negligently given. The action has been before this court upon two previous occasions, but the point now raised by this appeal is presented for the first time. The cross demand for damages set forth in defendant's answer was held to be established by the evidence and judgment was rendered by the trial court in favor of defendant for costs.

“It is now claimed upon the part of the plaintiff that neither the defendant's pleading, the answer of plaintiff thereto, nor the findings show, at the time the legal advice was given to defendant by plaintiff, the existence of the relation of attorney and client between them. In this regard the cross-complaint of defendant alleges: ‘That said plaintiff acting as attorney at law and as adviser and counsellor for the defendant in the premises, wrongfully and negligently disregarding his duties as such attorney at law, adviser, and counsellor, advised the defendant, on or about the 15th day of May, 1888, not to file for record in the county recorder's office, any claim of lien,’ etc. In his answer to this pleading the plaintiff says: ‘But plaintiff alleged that at no time prior to the 4th day of June, 1888, was this plaintiff attorney for, adviser or counsellor of the defendant, The West Coast Lumber Company, and that said plaintiff was not in the employ nor in any manner retained by said defendant, nor did said plaintiff ever receive from the said defendant any consideration whatever for any services of any kind or nature alleged to have been performed by said plaintiff for said defendant at anytime prior to the 4th day of June, 1888.’ The evi-

dence is not before us, but the finding of fact bearing upon this matter is as follows: 'That on the 17th day of April, 1888, on a day or two prior to the said 17th day of April, 1888, the defendant sought and obtained of the plaintiff advice in reference to filing a material lien against said Newman for the lumber defendant had furnished said Newman, as aforesaid; that said plaintiff advised the defendant not to file any lien for the reason that said Newman was about to file a lien as an original contractor,' etc.

"Taking this allegation of the answer and the denial thereto it fairly appears that an issue was made as to the relations existing between the parties at the time the advice was given. And a fair and reasonable construction of the finding of fact points to the same result. When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*. We see no reason why the attorney under such circumstances could not recover for the value of his services, and, if that be the fact, certainly the relation of attorney and client is created. \* \* \*

"We do not see the soundness of the contention to the effect that plaintiff could not be defendant's attorney because at that time he was the attorney of Newman regarding the same subject-matter of litigation. We do not see that Newman was a party necessarily adverse to defendant, even if that were material. Newman was the contractor, and defendant was seeking advice upon its rights as to filing a lien upon the building, the property of a third party, and even defendant's knowledge that plaintiff was Newman's attorney at these times does not appear to be material as defeating the creation of the relationship of attorney and client between plaintiff and defendant.

"For the foregoing reasons the judgment and order are affirmed."

So one riding on a railroad pass and paying no fare, may recover from the railroad company for injuries resulting from gross negligence. See case of Philadelphia & Reading R. R. Co. v. Derby, 14 How., 467, and cases there cited.

"It is no defense to an action against an attorney for negligence or fraud that he acted without consideration. He is under no obligation so to act, but if he does, in fact, undertake the performance of the duties involved, he must answer for his negligence, default or fraud in the same manner as if he had received a reward." (Mecham on Agency, Sec. 834.)

Eckels v. Stephenson, 3 Bibb (Ky.), 517.

Stephens v. White, 2 Wash. (Va.), 203.

Brome v. Diggles, 2 Chitty, 311.

Whitehead v. Greetham, 2 Bing., 464.

The only case we have been able to find which appears not to be in harmony with the above decisions is the case of Fish v. Kelly, 17 C. B. R. N. S., 194, but the court there expressly held that if the transaction had been effected by fraud, its decision would have been otherwise.

The declaration in the case at bar avers :

"And the defendant, disregarding his duty in the premises, but, on the contrary, wrongfully intending to mislead the plaintiff to its injury, and to induce it to accept said order, represented and declared," etc. (Rec. 2.)

Upon the foregoing authorities, we submit as clearly established that if the defendant, though without consideration, undertook to perform the services in question, and did so negligently, an action will lie against him, and also, that even if there were no contract or contractual relations between the parties, but the transaction was tainted with fraud, an action will lie.

He concedes, as the case now stands, that he was an attorney at law, that he did undertake to advise the plaintiff upon the subject upon which it sought his advise; that he well knew the fact that under the rules, regulations and practice of the Treasury Department, the fund in question would not come into his hands, but would be

paid directly to Driscoll, and that, so knowing, and for the very purpose of misleading the plaintiff, he declared to it that the fund would certainly pass through his hands enabling him to pay to it the amount of the order upon him which its debtor, Driscoll, was asking it to accept, thus tying its hands until the order should mature, and that, further to mislead the plaintiff, he continued to repeat to it these misrepresentations until the very eve of payment by the Government of the fund in question to Driscoll directly and until it was too late for the plaintiff to protect itself or its order by legal proceedings, that he thereupon affirmatively cooperated with and aided Driscoll to secure possession of the fund, without it passing through the hands of the defendant, and that by reason of his said wrongful acts, intended for the very purpose of misleading the plaintiff, it lost its debt.

It would not only be an irreconcilable departure from all the principles recognized and established by the authorities above cited, but a most unfortunate and indefensible state of the law, if, upon these admitted facts, the defendant were without liability and the plaintiff without redress.

J. J. DARLINGTON,  
E. S. DOUGLASS,  
JOSEPH D. WRIGHT,  
*Attorneys for Appellant.*



COURT OF APPEALS,  
DISTRICT OF COLUMBIA,  
FILED

APR 1 1902

*Robert H. Hilly*

# Court of Appeals, District of Columbia

JANUARY TERM, 1902.

No. 1173

JACKSON & SHARP COMPANY, A CORPORATION,  
APPELLANT

vs.

JOHN C. RAY, APPELLEE

As A. HODGINS, JR.

Attorney for Appellee



# Court of Appeals, District of Columbia.

JANUARY TERM, 1902.

---

*No. 1173.*

---

JACKSON & SHARP COMPANY, A CORPORATION,  
APPELLANT,

vs.

JOHN C. FAY, APPELLEE.

---

## STATEMENT.

The statement of the case set out in the appellant's brief is so at variance with the averments of the declaration that it becomes necessary for the appellee to call the court's attention to the case as made in the record. The averments of the declaration are in substance that one Daniel A. Driscoll on the 14th of August, 1895, was indebted to the appellant in the sum of \$732, and on that day Driscoll applied to the appellant to accept his order on the appellee in said sum, directing the appellee to pay the appellant said sum of money out of the first moneys realized from a suit then about to be brought in the Court of Claims in behalf of said Driscoll against the United States by the said appellee, who had been then employed by Driscoll to prosecute said suit.

There is no averment in the declaration that Driscoll was

then or ever has been insolvent (that statement first appears in the appellant's statement of the case and finds no warrant in any part of the record).

Before accepting the order offered by Driscoll the appellant avers that he applied to the appellee to learn from the appellee whether the money which Driscoll might recover in the action would pass through the hands of the appellee, so that the appellant would be safe in accepting the proposed order, although the purpose of the inquiry is not alleged to have been disclosed.

The declaration then avers that it became the duty of the appellee, the attorney for said Driscoll and who is not averred to have been employed by the appellant in any capacity, to inform the appellant that the proceeds of the judgment would not be paid to the appellee, but no suggestion is made that the appellant disclosed any intention of acting on any information he might receive.

But (it continues) the appellee, disregarding his duty, declared that the moneys which might be realized would certainly pass through his hands, and he would thereby be enabled to pay the appellant the amount of said order, and that he would do so when the claim had been reduced to judgment and paid, and all this with respect to a claim not yet in suit and a contested claim, which might never result in a judgment at all.

The declaration further avers that the appellant accepted from Driscoll an order on the appellee (set out on p. 2 of the record), which the appellee in writing accepted (in the form set out on p. 3 of the record).

The declaration then avers that, relying upon the order and acceptance and the representations of the appellee that the money realized from the judgment would come into the appellee's hands and would be applied to the payment of the order, refrained from protecting itself from legal proceedings and continued to refrain from protecting itself until the 12th of February, 1900, when the appellee notified it

that the judgment would be paid to Driscoll direct and would not come into his hands at all, which the declaration avers was too late for the appellant to protect itself by legal proceedings; and it further avers that by reason of the wrongful and untrue representations made prior to August 14, 1895, that the avails of any judgment recovered would pass through the hands of the appellee, made with the knowledge that they would not, the appellant wholly lost the said sum of \$732, although it is nowhere alleged that a judgment sufficient to pay it was ever recovered, and therefore brings this suit against the appellee.

To this declaration a demurrer was interposed, which demurrer was after full argument sustained, and, the appellant electing to stand on his declaration, judgment for the appellee was rendered, and from that judgment this appeal has been prosecuted.

### ARGUMENT.

The gravamen of this suit consists in the averment that the appellant's debtor proposed to give the appellant an order upon the appellee for the payment to the appellant of a sum of money which might possibly accrue to the debtor out of a suit about to be instituted by the appellee, as attorney for the debtor, against the United States, and in order to ascertain whether the appellant would be safe in accepting the order he applied to the appellee to know whether in case of a successful prosecution of the proposed suit the avails of the judgment would pass into the appellee's hands. That was all that he desired to ascertain, and if it *were* true that the avails of the judgment would pass into the appellee's hands, how that mere fact would furnish any security to the appellant is not disclosed. It is hard to see how, if the amount would pass into appellee's hands, without anything further, that fact could furnish any security to the appellant

in taking an order. If he took the order, it could be at best but an equitable assignment, and it may well be doubted whether there can be such a thing as an equitable assignment of a part of a chose in action. Unless the appellee in some way accepted the order, and accepted it in writing, it is rather difficult to perceive how the mere giving of an order on the appellee would have constituted the appellee a debtor to the appellant, unless a person can be made debtor to another without his consent. It appears to us to merely state this proposition is to answer it.

There is no averment in the declaration that the appellee in a conversation made any promise or obligation to pay the order. The language of the declaration is that "he represented that the money would pass through his hands and he would thereby be enabled to pay the appellant," and the only promise to pay by the appellee is the conditional written promise endorsed on the order. Any other promise except the written promise to pay a debt of another would be void under the statute of frauds, and no other promise is averred, and the declaration goes on to say that the condition upon which the acceptance was made never was fulfilled.

The grounds of action set out in this declaration are utterly untenable upon any principle of legal liability.

The deceit alleged in the declaration is that the appellee was aware that under the rules, regulations, and practice of the Treasury Department the proceeds of the judgment would not be paid to the appellee, and knowing that fact represented to the appellant that they would. By reference to the regulations of the Treasury Department, of which regulations the court takes judicial notice, it appears that the regulations provide expressly for the delivery to a claimant's attorney a draft in payment of a judgment of the Court of Claims, and further provide how that draft may be indorsed, to wit, by power of attorney to the attorney to indorse the same, so that, instead of the regulations of the

Treasury Department prohibiting the payment to the attorney, the only regulations on the subject are regulations which prescribe the manner and mode of making such payment, so that if the appellee had stated that the avails of the judgment would come into his hands the statement would not have been in conflict with the regulations of the Treasury Department, as claimed in the declaration, and for that reason the second ground of the demurrer was properly sustained. A further difficulty arises in the case from the fact that no damage has accrued to the appellant. It is not averred that the appellant released his debtor or accepted this order in payment of the debt, or that he is without remedy, or that the debtor is without property, or that there is any reason in the world if he has a legitimate claim against his debtor that he cannot pursue it, and not only recover judgment, but satisfaction of the judgment.

It certainly appears that Driscoll has property and has the ability to pay the claim, because it is shown that he received the avails of this judgment, and it is not even averred that he ever refused to pay or was ever asked to pay or was ever unable to pay.

How the appellant's claim could have been wholly lost the declaration does not disclose, nor is a fact that is not well pleaded ever admitted by demurrer.

The effort of the appellant in his argument to show that under the authority of the case of *Forrest vs. Price* he might have by some proceeding collected the money direct from the Government is not apt. That action was maintained under a peculiar jurisdiction conferred on the court of chancery of New Jersey by a statute of the State of New Jersey, where the parties resided, where, after a *nulla bona* returned upon a judgment at law, a court of equity might act and appoint a receiver, &c. No such proceeding could be had in the District of Columbia, where no such statute is in force, and no such decision had been rendered in the Supreme Court at the time of the institution of this suit.

To summarize, the appellee contends that in law to obtain damages for injury caused by alleged deceit it must be shown:

1. That there is a false representation of material facts;
2. That it was made with a knowledge of their falsity;
3. That the injured party was ignorant of its falsity, and believed it to be true;
4. That it was made with the intent that it should be acted upon; and,
5. That it was acted upon by the injured party.

The mere expression of an opinion, even in strong and positive language, is no fraud, though it be false. Nor can deceit be predicated upon the false statement of what the law is, however false it may be, whether the deception be by false representation or by the suppression of the truth. The statement of what the law is is one upon which the party to whom it is made has no right to rely. He can ascertain the truth or falsity of such representation by ordinary diligence.

Deception in order to be actionable must relate to *existing* or past facts.

See 5 Am. and Eng. Enc. Law, title "Deceit," and cases cited.

In false pretenses it is essential to the crime that the false statement or representation must be of an *existing* or *past* fact. If property or money be parted with on the inducement of a promise to perform some act in the *future*, no criminal offense is committed.

See (7) *id.*, title "False Pretenses," and numerous authorities cited.

See the case of *Sawyer vs. Prickett et al.* (19 Wall., 146, 160), opinion by Justice Hunt, in which he points out the distinction as to *past* or *existing* facts and mere *promissory*

statements, both in respect of indictments and actions, and wherein he refers to the decided cases bearing upon the question (*People vs. Williams*, 4 *Hill*, 9; *Ranney vs. People*, 22 *N. Y.*, 413) and holds:

"A promissory statement is not ordinarily the subject either of an indictment or of an action."

See, also, same thing in the case of *Upton vs. Tribilcock* (91 *U. S.*, 45).

In this case there was no misrepresentation of the existing facts. As a matter of fact there was no misrepresentation of any fact whatever. The representation alleged to be false was in fact true, and of this the court will take judicial notice of the regulations of the Treasury Department on this subject, as was stated in the case of—

*Wilkins vs. United States* (96 *F. R.*, 837):

"Regulations made by an executive department in pursuance of authority delegated by Congress have the force of law, and the courts will take judicial notice of their existence and provisions; hence an indictment charging a violation of such a regulation which is made to be an offense by statute, need not set out such regulation, but is sufficient if it avers that an act done in pursuance of such regulation was done under the requirements of law."

In conclusion, it may be proper to observe that a labored effort is made in the brief of appellant herein to establish, by citation of authorities, that where the relation of attorney and client exists a misrepresentation by such attorney to the client by a false statement of the law is actionable, and that this same rule of liability attaches even though no fee therefor be paid or charged.

In short, the appellant, while forced to concede that misrepresentations of law do not constitute sufficient ground for an action for damages, yet asserts that where the relation of attorney and client exists an exception to the said rule is recognized and followed.

To summarize, the appellee contends that in law to obtain damages for injury caused by alleged deceit it must be shown:

1. That there is a false representation of material facts;
2. That it was made with a knowledge of their falsity;
3. That the injured party was ignorant of its falsity, and believed it to be true;
4. That it was made with the intent that it should be acted upon; and,
5. That it was acted upon by the injured party.

The mere expression of an opinion, even in strong and positive language, is no fraud, though it be false. Nor can deceit be predicated upon the false statement of what the law is, however false it may be, whether the deception be by false representation or by the suppression of the truth. The statement of what the law is is one upon which the party to whom it is made has no right to rely. He can ascertain the truth or falsity of such representation by ordinary diligence.

Deception in order to be actionable must relate to *existing* or past facts.

See 5 Am. and Eng. Enc. Law, title "Deceit," and cases cited.

In false pretenses it is essential to the crime that the false statement or representation must be of an *existing* or *past* fact. If property or money be parted with on the inducement of a promise to perform some act in the *future*, no criminal offense is committed.

See (7) *id.*, title "False Pretenses," and numerous authorities cited.

See the case of *Sawyer vs. Prickett et al.* (19 Wall., 146, 160), opinion by Justice Hunt, in which he points out the distinction as to *past* or *existing* facts and mere *promissory*

statements, both in respect of indictments and actions, and wherein he refers to the decided cases bearing upon the question (*People vs. Williams*, 4 *Hill*, 9; *Ranney vs. People*, 22 *N. Y.*, 413) and holds:

"A promissory statement is not ordinarily the subject either of an indictment or of an action."

See, also, same thing in the case of *Upton vs. Tribilcock* (91 *U. S.*, 45).

In this case there was no misrepresentation of the existing facts. As a matter of fact there was no misrepresentation of any fact whatever. The representation alleged to be false was in fact true, and of this the court will take judicial notice of the regulations of the Treasury Department on this subject, as was stated in the case of—

*Wilkins vs. United States* (96 *F. R.*, 837):

"Regulations made by an executive department in pursuance of authority delegated by Congress have the force of law, and the courts will take judicial notice of their existence and provisions; hence an indictment charging a violation of such a regulation which is made to be an offense by statute, need not set out such regulation, but is sufficient if it avers that an act done in pursuance of such regulation was done under the requirements of law."

In conclusion, it may be proper to observe that a labored effort is made in the brief of appellant herein to establish, by citation of authorities, that where the relation of attorney and client exists a misrepresentation by such attorney to the client by a false statement of the law is actionable, and that this same rule of liability attaches even though no fee therefor be paid or charged.

In short, the appellant, while forced to concede that misrepresentations of law do not constitute sufficient ground for an action for damages, yet asserts that where the relation of attorney and client exists an exception to the said rule is recognized and followed.

It is not necessary to follow appellant in that line of discussion, since, even if any such exception be proper and sustained by the authorities, in a case containing proper allegations in that behalf (which, however, is not here conceded), yet, as will be noted, the declaration in this case contains absolutely no allegations whatever tending in the slightest degree to establish, or even allege, that any such relation existed or was even claimed to exist in this case: the allegations of the declaration entirely negative the existence of any such relation. It is respectfully submitted that such claim is without the slightest foundation in allegation, and comes only apparently from an effort to sustain a declaration totally insufficient in allegation to permit of the consideration of the doctrine so invoked.

Respectfully submitted.

A. A. HOEHLING, JR.,  
*Attorney for Appellee.*

# APPENDIX.

---

## CIRCULAR.

### *Regulations Governing Attorneys and Agents Practicing Before the Treasury Department.*

1890. Department No. 94. Division of W., E., & A.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
WASHINGTON, D. C., *October 14, 1890.*

The following amendment to the regulations governing the practice of attorneys and agents before the Treasury Department is published for the information and guidance of all concerned:

\* \* \* \* \*

4. Drafts issued in payment of judgments rendered by the Court of Claims shall be made to the order of the judgment creditor and delivered to or sent in care of the attorney certified by the court to be the attorney of record upon his filing in the Department the written authority of the claimant for such a disposition of the draft, executed in proper legal form, after the date of the rendition of the judgment by said court.

\* \* \* \* \*

The Secretary reserves the right in all cases to make such special orders as may be proper.

WILLIAM WINDOM,  
*Secretary.*

*Indorsement and Payment of Treasury and Post-office Department Warrants.*

1895. Department circular No. 194. Treasurer's office, No. 64.

TREASURY DEPARTMENT,  
OFFICE OF THE TREASURER,  
WASHINGTON, D. C., *December 26, 1895.*

Treasury and Post-office warrants must not be paid until the indorsements conform to the following regulations:

\* \* \* \* \*

6. Powers of attorney for the indorsement of warrants in payment of claims must be executed as required by section 3477 of the Revised Statutes of the United States. The letter of attorney must describe the warrant, stating the number, date, amount, and kind of warrant issued; must be signed by the constituent in the presence of at least two attesting witnesses subsequently to the date of the warrant, and be acknowledged by him before a notary public, and certified by such officer under his hand and official seal; or, when not before a notary public, the acknowledgment must be before an officer having authority to take acknowledgments of deeds within the State or Territory in which it is taken, which authority must be shown by a certificate as to the official character and signature of such officer and setting forth that he is duly authorized to take acknowledgments of deeds, made by the clerk of a court of record of such State or Territory, under the seal of the court, or by some other officer of the State or Territory authorized to make such certificate, under his official seal. \* \* \*

D. N. MORGAN,  
*Treasurer of the United States.*

Approved.  
R. B. BOWLER, *Comptroller.*

Approved.  
S. WIKE,  
*Acting Secretary of the Treasury.*

